

# THE CENTRAL LAW JOURNAL

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Editor.

ST. LOUIS, FRIDAY, AUGUST 20, 1875.

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Contributing Editor.

IN *Neeley v. The State*, published in the Nashville Com. & Leg. Reporter for June 9, the Supreme Court of Tennessee, McFarland and Freeman, JJ., dissenting, held that the provision of the constitution of that state, and that in the constitution of the United States, guaranteeing the right of trial by jury, imply that the right shall never be encumbered with conditions, which in their practical operation may impair the free and full enjoyment of the right. The court, therefore, hold that the Tennessee act of February 24, 1875, entitled An act to tax the losing party with the jury fees in all cases in civil suits, and to repeal sections 4036 and 4037 of the code, will operate as an attack upon the integrity of jury trials, and is therefore unconstitutional and void.

It is possible that we may have, this winter, a repetition of the Tilton-Beecher trial. Formal notice was recently served by Mr. Tilton's counsel, upon Mr. Beecher's counsel, that the case would be again called in September; but it is said that this is a mere *pro forma* notice, and does not indicate that another trial will be pressed. We do not suppose that the country cares much about it, one way or the other. The defendant, outside of Plymouth church, is no longer what he was. The evidence adduced in this trial has destroyed him utterly. As a popular idol he shines no longer. This ordeal has sunk him to the level of the common herd; and, once there—adulterer or fool, the people do not care which. His loves and his follies are now no more than those of common men, and the public care no more for them.

THE Missouri constitution was signed by all the members of the convention who were present on the day of signing—sixty in all. Those who were absent, eight in number, were given until the 30th of October to sign the instrument. It is claimed that, in reality, the constitution was unanimously adopted, and that this instance of such a result, hardly has a parallel in this country. In the convention of 1845, the constitution was adopted—ayes, 49; nays, 13; absent, 4. In that of 1865, the Drake constitution was adopted—ayes, 38; nays, 13; absent, 13. Although its provisions in regard to representation in the legislature are most unjust towards the large cities; yet they get more under the new instrument than under the old. No opposition, so far, seems to have been developed, to the New Constitution, and it will without doubt be ratified by a large majority.

REVIEWING BOOKS.—We find the following in the London Law Times:

An American legal periodical called the CENTRAL LAW JOURNAL, speaks of the "indiscriminate practice to which some law journals are addicted of puffing every new law book that comes out." Our cotemporary says that such a practice deserves "severe reprobation." "The subscribers of a legal journal have a right to expect that when a new law book is issued from the press, it shall advise them with some degree of candor, and after taking some pains in the investigation, whether it is worthy of a place in their libraries or not. This is the more necessary, since the business of writing legal treatises has of late years to a great extent fallen into inexperienced and incompetent hands." We quite agree; but so little do English barristers like to be told of the blunders they make in writing books, that two authors whom we could name

withhold their works from us so as to escape fearless criticism. Such works must be exceptionally bad. In future we shall publish the names of the books which are not forwarded in due course for review.

We are glad to find the above views supported by our excellent neighbor, the Chicago Legal News. That journal, commenting on the above, says:

We agree with what our brother of the CENTRAL LAW JOURNAL and of the London Law Times says. It is the duty of a law journal to criticise every new law book, fairly and fearlessly. We very much dislike to injure the reputation of an author, and the financial prospects of a publisher. But we always have spoken and we always will speak the truth about every new law book we notice. We intend to pay more attention to this department of the News in the future, and to point out to the profession the imperfections of new law books, whether they are sent to us for notice or not. Any publisher that fears fair criticism, had better not send his book to our sanctum.

We will take occasion to add to what we have already said upon this question, that it is our purpose, so far as our strength and the space at our disposal will permit, to notice new law publications on important questions, whether sent to us for the purpose of being noticed or not. It is our aim to make this department of the JOURNAL, not an advertising page, but so far as we are able, a department of news and of candid criticism.

CHIEF JUSTICE NEILSON.—The Albany Law Journal having recommended Chief Justice Neilson for promotion to the supreme court, the Legal Gazette strongly dissents, and thinks that the judge exhibited "indecision and imbecility," in not suppressing the frequent bursts of applause which interrupted the proceedings. That journal adds: "The case before him, was one which, under strict ruling, and with due regard to the rules of evidence, might have been tried in one-half the time; but the judge seems to have considered the jury as a receptacle in which to pour, unchecked, all the tea-table scandals and old women's gossip of Brooklyn. Nevertheless, in the language of our contemporary, we do not know but that he *would* add needed strength to the Supreme Bench of the Second Department." We do not think there was anything in his conduct of that trial, to justify such disparaging remarks. His conduct, throughout, was eminently fair, judicial, and free from all taint of prejudice. It stands out in this respect, in striking contrast with the intense bias manifested by Lord Chief Justice Cockburn, in the Tichborne case. His rulings were ready and generally correct. His liberal course in admitting testimony which may seem irrelevant, is to be applauded. Too many cases of this magnitude, and even where life has been at stake, have been tried on a *part* of the evidence; and this is one of the severest imputations that can be made against the common law rules of evidence. Judge Neilson wisely chose to err, if at all, on the right side; and if the law had been as just as he, and had permitted Mrs. Tilton to testify, we might have been spared a repetition of the filthy trial. Among the many able lawyers whom we have heard discuss this trial, we have never heard the conduct of the judge who presided over it, mentioned in other terms than those of the highest praise; and we believe that the general sentiment of the bar and of the country is, that he acquitted himself with a high degree of honor, and that the

even manner in which he held the scales of justice during a trial so difficult and so protracted, has greatly increased the respect which foreigners will feel for the judicial bench of this country.

**JUDICIAL LEGISLATION.**—Elsewhere we republish, from the New York Daily Register—a paper which contains a great many well-written editorials—a suggestive article entitled “Judicial Legislation and its Effects.” The evil complained of by the writer is mis-called judicial legislation, and would be more properly called *judicial disregard of precedents*. Whenever a court of last resort is called upon to determine a new question, its determination is necessarily judicial legislation. In such cases it necessarily declares a new rule, where the law was silent previously, and its judgment is not, according to the erroneous view of Blackstone, a mere declaration of the previously existing law. This will be more apparent, when we consider the manner in which courts of error examine questions which are brought before them for the first time. As soon as the question is ascertained to be *res integra*, the court does not enter upon an historical enquiry to ascertain what the previously existing unwritten common law was with reference to it—for in this country, at least, there is no unwritten common law,—but it enters upon a course of *reasoning*, with the view of ascertaining where the justice of the case lies, and also with the view of determining the probable consequences upon society of this or that rule governing it. Thus the result is reasoned out *de novo*, having regard, of course, to the analogies of the law, and is not reached by a course of antiquarian research. And hence it is, that the law is said to be, as the writer whose article we elsewhere print suggests, “the perfection of *reason*.” And thus it is that we have two legislatures, the legislature proper and the judicial legislature; and two kinds of law, legislature-made law and judge-made law.

The evil of which the writer in the Daily Register complains, can scarcely be exaggerated. It has a direct tendency to unsettle public confidence in the administration of justice, and to introduce anarchy into society. If the judges of the highest court were required each year to send a message to the legislature, as the President or the governor is required to do, advising them of what changes seem to be necessary in existing laws, with the reasons which urge such changes, an important step toward checking the judicial disregard of precedents would no doubt have been taken. Then, whenever, it should become apparent to the court of last resort, that a change is needed in the established law, the judges would, instead of making the change themselves, report the question to the legislature. This would no doubt help somewhat; but a codification of the common law would seem to be the only effective check upon capricious judicial changes in judge-made law, as well as the only way out of the anarchy in which judicial decisions have left the law on many important questions.

**ACTION FOR MALICIOUS ARREST—WHEN SPECIAL DAMAGES MUST BE AVERRED.**—In *Stanfield v. Phillips*, 32 Legal Intelligencer, 249, which was an action for malicious arrest, the declaration, after setting forth the facts circumstantially, concluded with the averment that “by means of which said several premises, he, the said plaintiff, during his said im-

prisonment, suffered great pain and anxiety of body and mind, and was prevented from transacting his necessary affairs and business by him, during that time to be performed, and thereby also, the said plaintiff necessarily incurred divers costs and expenses, to-wit: to the amount of five hundred dollars, in and about the obtaining his release from the said arrest and imprisonment, and in and about the defending himself against the said warrant of arrest, and in and about other the premises, and by means of the premises the said plaintiff was and is injured in his credit and circumstances, and otherwise greatly damnified, to the damage, &c.”

Upon the trial, after proof of the plaintiff's arrest upon the charges made by the defendants in their complaint, and his discharge by the judge, who issued the warrant, he was asked, were you subjected to, or did you suffer any special damage by reason of this arrest? The question was objected to by the defendants, and the witness was not permitted to answer it. The plaintiff's counsel then offered to show in what manner plaintiff was injured in credit and circumstances, and to what extent. This offer was objected to, as no special damage was averred in the plaintiff's declaration; and because evidence should be confined to special facts of damage. Also, because not elements of damage to be recovered for in this action. The objections were overruled, and a bill of exceptions sealed for the defendants. Proof was then admitted on the part of the plaintiff, that the consummation of an arrangement, which they, that is, the copartnership composed of the witness and the plaintiff, under the name of J. R. and J. S. Phillips, had with their creditors for an extension of time on their claims, failed by reason of the illegal action of the defendants in the prosecution and arrest of the plaintiff; that they were thereby obliged to pay out all their moneys upon their debts, and were thus deprived of means with which to carry on business; that this action on the part of the defendants caused the plaintiff's illness, and prevented their creditors from acceding to their propositions; that it embarrassed them in the conduct of their business, and led to their suspension.

It was held (Mr. Justice Williams dissenting), that the declaration being general, evidence of special damage, such as that excepted to, could not be admitted. “If,” said the court, (Gordon J.), “the plaintiff desired to recover special damages he should have set forth the causes which produced them with particularity, in order that the defendant might know with certainty what he had to meet. This rule imposes no hardship upon the plaintiff, and the enforcement of it is but a matter of justice to defendant.”

#### Preferences under the English Bankrupt Law.

Our English cousins are, it seems, having more trouble with their bankrupt law than we are having with ours. According to the Solicitor's Journal, the House of Lords has decided that according to the present law of that country, a person finding himself insolvent, may realize and distribute his assets among his creditors according to his own view of their deserts; and that, although he is made a bankrupt, or files a petition for liquidation the next week or the next day, the court of bankruptcy must restrain itself from giving way to its old-fashioned notions about an equal division among all the creditors, and must be content with administering so

much of the debtor's estate as he has chosen to leave unadministered by himself. "This," says that journal, "is a startling statement; but any one who will take the trouble to read the case of *Ex parte Butcher*, *In re Meldrum* (reported in L. R. 9 Ch. 595, and more fully in 22 W. R. 721, where the judgment of Bacon, C. J., is also given), must, on hearing that that decision has been affirmed by the House of Lords, admit that the statement is strictly true. Nor are we able to lessen surprise by adding that their lordships felt constrained to come to the conclusion at which they arrived, by the imperative words of an act of Parliament. On the contrary, the Bankruptcy Act is capable of another and less astonishing construction; but the interpretation selected by the lords seemed to them to carry out a deliberate intention fairly to be attributed to the legislature."

The material part of the 92d Section of the English Bankruptcy Act, which has received this construction, is as follows:

Every conveyance \* \* \* or charge, \* \* \* every payment made \* \* \* by any person unable to pay his debts \* \* \* in favor of any creditor, or any person in trust for any creditor, with a view of giving such creditor a preference over the other creditors, shall, if the person making, \* \* \* paying, or suffering the same, become bankrupt within three months after the date of making, \* \* \* paying, or suffering the same, be deemed fraudulent and void as against the trustee of the bankrupt, \* \* \* but this section shall not affect the rights of a purchaser, payee, or incumbrancer, in good faith and for valuable consideration.

"According to the present decision," continues the Solicitor's Journal, "this means that a man shall not prefer any of his creditors if they know that he is preferring them. It seems a strange thing that, if this is the meaning, or one of the meanings, of the saving clause, the word 'creditor' was not used. There is, no doubt, force in the observation that it is hard on creditors who have received their debts in ignorance of the debtor's insolvency and of his wish to prefer them, to have to refund the money so paid, probably at great inconvenience to themselves. But it is surely more hard on the other creditors to find that the bulk of the assets has been carried off just in time to prevent its equal distribution by the court; while if it were the law that a preferred creditor had to refund, the temptation to prefer one creditor to another would be taken away from a debtor, as he would know that any attempt to do so would be merely exposing the favored creditor to inconvenience and annoyance."

#### Mixed Rural and Urban Homesteads.

Several interesting questions have arisen where the premises claimed as a homestead, have consisted of lands partly lying within, and partly without the limits of an incorporated city or town.

In a case determined in Illinois in 1863, (*Thornton v. Boyden*, 31 Ill. 200), a deed of trust had been made to secure a debt. The wife of the debtor joined in the deed, relinquishing her dower, but the acknowledgment contained no relinquishment of her right of homestead. The land consisted of eighty acres, which the debtor cultivated as a farm. It adjoined several village lots, and on these lots stood the dwelling-house of the debtor, his residence and the residence of his family at the time of the execution of the deed, and also at the time of the sale. The entire premises were under one fence, and together were used and cultivated as a farm. It was held competent for the defendant to show that the tract of land in controversy adjoined his

dwelling-house, and was claimed by him as his homestead. This point was not discussed in the opinion, and there was another point on which the plaintiff's judgment was reversed, namely, the adjournment of the sale by the trustee, without renewing the thirty days' notice required by the deed, which was held a fatal defect in the plaintiff's title.

By the constitution of Kansas (Art. XV, § 9), "a homestead to the extent of one hundred and sixty acres of farming land, or of one acre within the limits of an incorporated town or city, occupied as a residence by the family of the owner, together with all the improvements on the same, shall be exempted from a forced sale under any process of law, etc." In *Sarahas v. Fenlon*, 5 Kas. 592, a debtor owned one hundred and two and three-fourths acres of "farming land." This lay in a body of irregular shape, seventeen and one-fourth acres of which was included within the corporate limits of the city of Wyandotte. His family residence was situated on the portion outside the city limits. The whole was cultivated as one tract. It was contended on the part of the debtor that since the constitution exempts one hundred and sixty acres of farming land, the exemption has no other limitation or qualification except that the land be occupied as "farming land" by the owner; that when it is shown to be "farming land," the exemption attaches to it, whether inside or outside the city limits; that the alternative of "one acre" within the limits of an incorporated town or city, can only be held to apply to homesteads not used as "farming lands;" and that any other construction would ignore the reason of the wide distinction as to the quantity of the homestead, and would contravene the intention of the framers of the constitution, and of the people in ratifying it, and would open the door, through the device of the enlargement of corporate limits to totally depriving a considerable proportion of the owners of agricultural homesteads from the benefits of the exemption. But the court were of a different opinion. Said Kingman, Ch. J., in delivering the opinion of the court: "Even if the claimant lived on that part within the city, he could hold but one acre as a homestead, exempt from execution, no matter whether it was worth ten or ten thousand dollars, or whether it was used for farming purposes, or was covered all over with a palatial residence. One acre is all that is exempt as a homestead under the constitution. If he lived on that part in the city, that acre would be his homestead, and the residue of the city property, as well as his land in the country, would be subject to forced sale under execution. This is the plain letter of the constitution; it can not be enlarged by construction, or made plainer by argument. Can he, then, claim a greater exemption because he does not live on the land within the city, than he could get if he did? Such a construction, if possible, would make the provision inoperative for good, and destroy the very noble purposes for which it was adopted. Thus, but one acre in the city would be exempt if he lived on it; and as he did not live on it, of course he can not claim that acre as exempt as a homestead. \* \* \* Possibly a reversal of this judgment on a different holding would be just what the plaintiff in error does not want. For, if he hold one acre in the city as his homestead, then all his other property would be subject to forced sale under execution; for he can not have two homesteads. We are not insensible of the great hardships so for-

cibly urged by the learned counsel for the plaintiff in error, attending the unnecessary extension of city limits over lands which could more appropriately be used for agricultural purposes; but this is not the proper tribunal to correct the evil."

In *Bull v. Conroe*, 13 Wis. 233, a homestead of twenty-two acres of land used for agricultural purposes only, and as such exempt from forced sale on execution or other final process under the revised statutes of that state, edition of 1849, was by a *subsequent* act of the legislature, annexed and included within the limits of the city of Racine against the wishes of the owner, who still continued to use it for agricultural purposes only, and to occupy it as his homestead. The court held that after its annexation to the city, the right of homestead therein was no longer governed by the provisions of the law relating to rural homesteads. The same principle was re-affirmed in *Parker v. King*, 16 Wis. 223. The grounds on which the former decision proceeds are as follows: The constitution of Wisconsin, in pursuance of which the homestead law here expounded was based, declared "that the privilege of the debtor to enjoy the necessary comforts of life, shall be recognized by wholesome laws, exempting a reasonable amount of property from seizure or sale for the payment of debts." It was held that what laws were to be considered "wholesome laws," within the meaning of the above ordinance, and what amount of property exempted from the payment of debts, was to be considered a reasonable amount, was a matter left to the legislature to determine; that, whilst if that body had, in violation of the duty enjoined upon it by the constitution, refused to enact any law on the subject, the courts would have been powerless to interfere, yet, since they had given effect to the right guaranteed by the constitution, the courts would not permit them to take it wholly away. On this last point, Mr. Chief Justice Dixon in delivering the judgment of the court said: "I can not assent to the proposition that the privileges spoken of in the constitution, and extended to debtors by existing laws, are, as to particular property which may come within the present protection, to be considered as vested rights, or as partaking so much of the character of such rights, that the legislature can not by future enactments, change or modify the laws so as to deprive debtors of a portion of the property which they now hold as exempt. It seems to me clear that if such statutes were general in their operation, and affected the interests of all debtors alike, according to the classes into which they are at present divided, and if they did not amount to a total repeal of all exemptions, but left debtors in the enjoyment of enough of the comforts of life, so that they could not readily and without hesitation say that the constitutional duty was unexecuted, they would be subject to objection on account of those clauses in the constitution which forbid the disturbance of settled rights of property. The immunities or benefits which debtors are to derive from the operation of such laws, are spoken of in the constitution as *privileges*, not *absolute rights*. The words used imply that the framers, although they made it obligatory upon the legislature to recognize them, considered them matters of legislative grace or favor, and not vested rights growing out of grants from the state, or compacts between the state and individual debtors. The state receives nothing, and the debtors pay no price, the consideration for which, does not

contribute to their own immediate and special benefit. They are more in the nature of gratuities commanded by the constitution and enforced by the legislature, and their perpetuity and safety, so far as future legislation is concerned, must depend entirely on the clause of the constitution which requires them, and such other clauses as prevent special and exclusive legislation upon subjects of general concern. The language of the constitution is general, and within it there is room for the exercise of a wide discretion on the part of the legislature. It declares that the privilege of the debtor to enjoy the necessary comforts of life, should be recognized by wholesome laws. As a general proposition it may be said that it is for the legislature to decide what are the necessary comforts of life, and what amount of property may reasonably be exempted, and to determine the sanitary proprieties of the laws by which such exemptions are recognized. But I can not assent to the doctrine that the discretionary power given to the legislature is absolute and unlimited, and that it may not do violence to the clause, as well by exempting too much as too little, or by protecting those things which are not of the necessary comforts of life, as well as by refusing to protect those which are; or by the passage of unwholesome laws, as well as by neglecting to pass those which are wholesome and proper. Nor do I believe that the action of the legislature in this respect is entirely beyond the reach or control of the courts."

In *Taylor v. Boulware*, 17 Tex. 74, a different conclusion was reached. The debtor and his wife had acquired a homestead near a town limit but not within its boundaries. The wife died leaving no children; the husband continued to occupy the lot as before, with his slaves, and with a niece and her husband. Meanwhile the limits of the town were extended so as to include about three acres and a half of land, and on this land, so included, was the dwelling of the debtor, with some out-buildings. Afterwards the land was sold under an execution against the debtor, and the purchaser having brought suit for possession, the question arose whether, under the circumstances, the land so included, and on which stood the residence of the debtor, was to be regarded as a lot or lots in the town, so as to restrict his homestead privilege to that quantity of land. This question the court answered in the negative, taking the position that the mere act of extending the corporate limits by the legislature, without any act of the corporation to give an extension of the plan of the town to those limits, could not change the character of the homestead. This conclusion is based upon a construction of the following provision of the constitution of Texas: "The homestead of a family not to exceed two hundred acres of land, not included in a town or city, or a town or city lot or lots, in value not to exceed two thousand dollars, shall not be subject to forced sale for any debts hereafter contracted."\* The reasoning of Mr. Justice Lipscomb, who delivered the opinion of the court, is as follows: "The protection of the homestead from forced sale, was no doubt a favorite object with the convention, and the constitutional provision intended to insure that object, has been regarded as entitled to a liberal construction. The term 'lot or lots' used in the constitution, must be taken and construed in the popular sense of those terms; and, when so used, never would be considered as embracing land within the jurisdictional limits of the cor-

\* Const. of Tex. (1845) Gen. Prov., § 22.

poration, not connected with the plan of the city. It might be important to the administration of the police laws of the corporation, that such lands and those who owned and occupied them, should be within its jurisdiction; but, until streets had been extended through the land connecting it with the plan of the town, the land could not be called a 'lot' of the town. It is admitted that the term 'lot' is sufficiently comprehensive to embrace any piece or parcel of land, and the land in controversy might be so designated, but not because it was within the corporate limits of a town. There is a large plantation commencing within three hundred yards of the court-house in which we are now holding court. That plantation may or may not be within the jurisdictional limits of the town of Tyler; but if it is, no one would ever think of designating it as a town lot in the town of Tyler. There is another view which fortifies the conclusions at which we have arrived; that is, that it will be impossible to know how the homestead will be affected by extending streets through it, and connecting it with the plan of the town. It may be so materially affected as to render it of little or no value as a homestead; and if it should be held that it was cut off from, and separated from the lands without the jurisdictional limits of the corporation, the owner would have an equity that should be secured to him. This, perhaps, could only be done by allowing him to make his homestead on the land without the corporate jurisdiction of the town. This we regard as a strong reason why the homestead should not be disturbed under the circumstances presented in this case."

This decision was re-affirmed in the subsequent case of *Bassett v. Messner*, 30 TEXAS, 604, decided by the Supreme Court of Texas\* in 1868. This was an action brought by the purchaser at a sheriff's sale, under execution, to recover possession of a tract of land, consisting of about 35 acres, which the defendant claimed as his homestead. At the time when the defendant acquired this land, it lay without the unincorporated village of Brenham, which then consisted of 100 acres of land which had been donated by the proprietor for the purpose of establishing the town, and which had been laid out by the county authorities, about one-fourth into streets, lots and blocks, and the remainder into five-acre lots. Subsequently by an act of the legislature, the town was incorporated and its boundaries extended, so as to embrace the defendant's land; but the premises had never been laid off into streets, blocks and lots, and there was no street through them, and only a public road passing by them. The court held, on the authority of *Taylor v. Boulware*, *supra*, that the defendant's land was still exempt as a rural homestead. Whilst this conclusion seems just and reasonable, and a necessary application of the doctrine of *Taylor v. Boulware*, the reasoning of the court seems unsatisfactory. Lindsay, J., who delivered the opinion, thought it "necessary to enquire into the extent of the power of the legislature to make such delegated grants of authority, to fractional portions of the body politic, as are embraced in the act of January 27, 1858." "It is conceded without hesitancy," said he, "that the legislature could confer authority upon the inhabitants of

a village containing three hundred souls, or a less number, to incorporate themselves into a town in the manner in the act provided. This right is unquestionable. But as a predicate for the grant of this authority, it is necessarily assumed that a village exists in fact, and that it is already a town or city in embryo, with streets and passways, and grounds already dedicated to public uses by the owners of the property thus congregated in such a community. But it is not conceded that the legislature of the state is at liberty to give authority to three hundred people, or a greater or less number, by a vote of a majority of them, to dedicate the property of those of them who refuse their assents, to any local municipal purposes. If such were the case, it would always be perilous to own a homestead of two hundred acres in proximity to one of these towns or villages, because the temptation to these corporations to absorb this rural homestead for the purposes of taxation, and for augmenting the local revenue, might be too strong to be withstood, and private rights already vested under constitutional law, might be lessened, varied and impaired, at the caprice, the whim, or the greed of a body of individuals, who might accomplish what the legislature itself would be incompetent to do. By direct act of legislation, [neither] the legislature of this, nor of any other state, acknowledging the restraint of constitutional law, forbidding the disturbance of vested private rights, would undertake to declare a homestead, anywhere in the county, an incorporated town or city, without the assent of the owner, and subject it to special taxation and burdens, in addition to the common charge incident to all property of the state, for the fiscal purposes of the government. What it would not, and (we may say) could not do directly, without violating a cardinal principal of the government, it should not do by indirect legislation. Hence, we can not admit that it was the purpose of the legislature to confer such extraordinary powers upon corporations organized under the authority of this act. In forming corporations, the express or implied assent of each corporator must exist to affect and bind him, so as to conclude and vary his rights of property, under the corporate powers established. Indeed, it may be said, his express assent is indispensable to change or to alter the nature of his estate in property. His duties and obligations to the corporation in which he may be situated, may arise from an implied assent, and are very different things from his right of property already vested under the sovereignty and sanctions of the government; because the government itself is subject to limitations and restrictions in its control over rights already vested by its own sanction and recognition. And this principle in government has its origin in the absolute necessity of the observance of good faith by governments towards their people, for the quiet, the repose and the harmony of society. If governments could break faith with their people, there would be no obligation nor incentive for the observance of private faith, between citizen and citizen in such governments. Nothing appears in the agreed case to show that D. Messner, the head of the family, gave his express assent to the change of his rural to a suburban homestead. Possibly this express assent, had it been given by him, might have given some color of justice to the view insisted upon by the appellant [the plaintiff]; as the husband or head of a family who has the power of disposition of the community property, in acquiring, by his own act, a new home-

\*The court which rendered this decision was established, and its judges appointed, by military authority, under the reconstruction act. These judges were: Hon. Amos Morrill, Chief Justice; Hons. Livingston Lindsay, Albert H. Latimer, Colber Caldwell, and Andrew J. Hamilton, Associate Justices.

stead, exposes his old one to the rapacity of his creditors, if such he has. But, even in this case, it is very questionable whether it would not require the concurrent assent of the wife, made manifest under due form of law, to change the character and nature of the homestead. There could not be in this case, any implied assent of the husband, to the extension of the limits of the village of Brenham, the inhabitants of which were authorized, under the act, to incorporate themselves into a town; for he was not an inhabitant of the village at the time, living on the one hundred acres originally donated and laid off into streets, lots and blocks; and there is no circumstance upon which a presumption of that implied assent could be founded. Hence, we conclude that the legislature itself could not work this metamorphosis of a rural, into a suburban homestead, without the consent of these peculiar words (*sic*) of the constitution; much less could the local municipal corporation of Brenham do so; and certainly we do not feel inclined, by any judicial interpretation, to achieve a result so repugnant to the letter and spirit of our domestic constitution."\*

The same doctrine was again affirmed in Texas in *Nolan v. Reed*, 38 Tex. 425; and the force of that case would seem to be that where property has acquired the character of a rural homestead, and the boundaries of an incorporated town have been extended over it, and the owner has thereafter subdivided it into lots and blocks, and built thereon houses which he has rented out to tenants for business purposes, so much of this property as includes his residence, continues to be his homestead. The claimant of the homestead owned a tract of one hundred and twenty acres adjoining the town of Navisota occupied by him as a rural homestead. He donated eighty acres of this to a railroad company. After this donation he laid off the remaining portion into lots and blocks. On two of these blocks he resided for some years, and claimed them as his homestead, they being worth less than two thousand dollars, although he had erected houses on one of them "which were rented out as business houses to divers and sundry persons," as we are informed, in the opinion of the court. Although it seems to have been unnecessary, in order to reach the conclusion which the court arrived at, to consider the character of a rural homestead as having continued, yet the court, *By* McAdoo, J., said: "When the right accrues as a rural homestead, can that right be destroyed, except by abandonment of it as such? Does this erection of houses for rent, or other purposes, on a rural homestead, thereby destroy its character as a homestead? Clearly not. At the time the property was designated as a rural homestead, there was no town near it. It was less than two hundred acres. He subsequently reduced, it by his donation to the railroad, to forty acres. He subsequently reduced it to two blocks. The proof clearly shows that he was opposed to the extension of the corporate limits of the town over his remaining property. It was, nevertheless, embraced in the corporate limits. This fact brings this case directly within the rule of *Bassett v. Messner*." It follows from these facts and this curious reasoning thereon, that where the limits of a

town are extended over a rural homestead, and the owner subdivides his land into lots and blocks, builds houses thereon and rents them out "as business houses to divers and sundry persons"—it still remains a rural homestead, if not of greater value than the limit of value of a town homestead, and this, notwithstanding the fact that under the Texas constitution, the limit of the rural homestead is *acres*, while the limit of the town homestead is *value*.

A view of the question similar to that in *Taylor v. Boulware*, *supra*, was taken by the Supreme Court of Iowa. The code of that state, edition of 1851, contained no provision as to the limit of *value* of the premises in which a homestead right might subsist, but provided (§1251) that "if within a *town plat* it must not exceed one-half acre in extent, and if not within a town plat, it must not embrace in the aggregate more than forty acres. Whilst this statute was in force, a case arose (*Finley v. Dietrick*, 12 Iowa, 516), in which, at the time the debt was contracted, the debtor resided outside the limits of the city of Dubuque, on a tract of land containing sixty acres. Before the creditor commenced to occupy it, and before the debt sued or was contracted, the legislature passed an act extending the city limits so as to include within them this tract; but it never was laid out in town plats. It was held, that the fact of being within the city limits did not bring the premises within the limits of a "town plat" as contemplated by the code, and that this was so, although in the code the word *town* and the word *city*, have the same meaning. Baldwin, J., who delivered the opinion of the court, said: "Towns, according to our statute, include cities as well as incorporated villages; and a village or town *plat* is a tract of land laid out into lots, streets and alleys, duly platted and recorded as provided by chapter 41 of the Code. The property claimed as exempt, never was, by the complainant or any other person, so platted. The legislature, by the act extending the corporate limits of Dubuque, brought the property in controversy into the city limits. Prior to this act, the complainant was entitled to his land as his homestead; and did this act change the right? We think not. The owner of a homestead, his wife concurring, may dispose of the same in any manner that may seem proper; but the homestead right having once legally attached, it cannot be taken away without the consent of the owner. The owner has a right to plat his homestead, and divide it into lots for town or city purposes; and when so platted, and the plats acknowledged and recorded, he cannot claim the homestead in acres, but an incorporated city or legislature cannot compel him to so subdivide his property. The value of the homestead cannot change the right of the owner to its exemption. The law confers this bounty upon both the rich and poor. The creditor gives credit with the full knowledge of the law, and if the whole of the debtor's wealth is in his homestead, it is free from the reach of the creditors."

WRIGHT, J., dissented, holding that "the intention of the statute was to exempt forty acres as agricultural lands in the country as contradistinguished from the town; and one-half acre in town or such a locality as that the use of land for agricultural purposes would be impracticable. "If," said the learned judge, "a party has his homestead, and the limits of a city or town should be so extended as to include

\*As to the power of a legislature, when unrestrained by constitutional restrictions, to annex territory to a town or city, see 1 Dillon on Municipal Corporations, 2d ed. § 126, and a numerous list of cases there cited. As to the taxation for municipal purposes of *rural property* within the corporate limits of cities and towns, see 2 Dill. Mun. Corp. 2d ed. §§ 633, 634.

it, I would not say that such extension would have the effect, without some act on his part to lessen the extent of his exemption. Without some act on his part converting his farm, or his forty acres more or less, used for agricultural purposes, into town lots, it would seem, to say the least, inequitable to say that a half acre instead of forty should be the limits of his homestead. If, however, he voluntarily selects his homestead within the corporate limits of a city or town, he must take what the law gives him."

### Railway Negligence—Stepping from Train while in Motion—Injury to Person not a Passenger.

DOSS v. MISSOURI, KANSAS & TEXAS RAILWAY CO.\*

*Supreme Court of Missouri, January Term, 1875.*

Hon. DAVID WAGNER,	} Judges.
" WM. B. NAPTON,	
" H. M. VORIES,	
" T. A. SHARSWOOD,	
" WARWICK HOUGH,	

1. Railroad Companies—Liable in Punitive Damages, when.—A railroad company is not liable in exemplary or punitive damages except where the acts of its agents, which brought about the injuries, are wanton or malicious.

2. Railroads—Stepping from Train while in Motion—When Negligence shown by.—Whether an attempt to step from a train when in motion is, under the particular circumstances of a given case, such negligence as will relieve the company of responsibility, is a question of fact for the jury.

3. Railroads—Injuries to Person not a Passenger acting as Escort—Measure of Care required of the Company.—The agents of railroad companies are liable for injuries caused by the want of ordinary care, where the person injured was at the train to meet with, or part from, a passenger, although not himself a passenger or employee. And in a case where plaintiff had in charge a lady and her infant child, held, that he was entitled to have sufficient time to escort her to a seat and then to leave the train. If the time of stopping was too short, or if the agent of the road failed to give the usual notice of the starting of the train, there was not an exercise of such ordinary care as the company was bound to employ in order to escape liability.

Appeal from the Vernon County Circuit Court. The facts are fully set out in the opinion.

*Philips & Vest*, for Appellant.

I. Respondent was not a passenger, nor is it averred that he entered the appellant's cars under any contract with or by permission of appellant, nor that it was necessary for him to have gone on the train. Hence the petition is bad. *Lucas Adm'r v. Taunton & N. R. R. Co.*, 6 Gray, 64, 66.

II. Appellant was under no obligation to give him signals of starting. Neither the custom of the railroads nor the courts have ever given these signals any such office. *Lucas, Adm'r v. T. & N. R. R. Co.*, 6 Gray 67.

III. Respondent's own negligence contributed to his alleged injury, as he attempted to leave the train while in motion, and as proof of the velocity of its motion, it is shown that he was flung by its force on the platform. It needs no citation of authorities to show that in such cases, toward a person not a passenger, the carrier was under no obligation to exercise any extraordinary care, but the least incautiousness on his part was most culpable. 18 Barb. S. C., 368; 18 N. Y., 422, 425-6.

IV. This was no case for punitive damages. If the injury to the person be committed unintentionally, and result simply from want of care, as in this case, the damages awarded should be compensatory. Exemplary damages in such actions can only be given where the act complained of was willful and intentional. *Goetz v. Ambs*, 27 Mo. 28, 33; *McKeon v. Citizens' R. R. Co.*, 42 Mo. 80; *Franz v. Hilterbrand*, 45 Mo. 121; 2 Greenl. Ev., §§ 250, 253, title Damages.

*Waldo P. Johnson*, for respondent.

\*For the report of this case we are indebted to proof sheets of the 59th Missouri Reports, furnished by the courtesy of the publisher, W. J. Gilbert, Esq., of Saint Louis.

I. A lady with an infant child, and especially in the night-time, has the right to be conducted on the cars, even by a person who is not a passenger. And the company is responsible for injuries done him in the premises through the negligence of its agents. *Farwell v. Boston & N. R. R. Co.*, 4 Met. 55, 56; *S. P. Phil. & Reading R. R. Co. v. Derby*, 14 How. 468; 45 Mo. 255; 46 Mo. 353.

II. The questions of fact whether plaintiff was on the cars under such conditions as gave him a right to be there, and whether plaintiff was injured by the gross negligence of defendant's servants, and whether plaintiff was guilty of contributory negligence, were all fairly left to the jury and there is no legal ground for disturbing their verdict. 50 Mo. 461; 37 Mo. 240; 26 Mo. 441; 45 Mo. 255; 46 Mo. 353.

NAPTON, J., delivered the opinion of the court.

This action was to recover damages for an injury sustained by plaintiff in stepping down from one of defendant's cars to the platform connected with the station house.

The petition states that defendant, as a common carrier, was bound to provide suitable means of ingress and egress in and from their cars, and suitable platforms, from which passengers could pass into said cars, so that passengers could pass with safety into the cars, and more especially into the car provided for female passengers; and that it was their duty to stop said car, so set apart for female passengers, at such platform, so that female passengers could pass into and out of said car with safety.

The petition then alleges that on the 10th of May, 1872, the plaintiff was attending his sister-in-law, with her infant child, to the depot at Nevada, with a view to place them in the ladies' car; that the train stopped in the night-time, and the employees of defendant grossly neglected to stop the ladies' car of said train, at said platform, as they were in duty bound to do, but allowed said car to be stopped at a place distant from said platform. And in consequence of said negligence, it became necessary for the lady and her child who were under plaintiff's charge, to pass through a number of other cars of said train, which were dark and unlighted, so that by the time the plaintiff, with the lady and child, reached the door of the ladies' car, the train started, without giving any signal, and persons on the train desiring to leave could not do so with safety.

It is averred that any female passenger has a right to be conducted into the car, where she is to be conveyed, and therefore plaintiff, having been requested in this instance by the female passenger to escort her, had a right to be in said car at the time aforesaid, and a right to be duly notified by signal or otherwise, of the time of starting said train, so that he could pass therefrom with safety.

Nevertheless, it is further averred, the agents of defendant, with gross negligence, started the train without giving any such signal or other notice, and the plaintiff, without any negligence on his part, in attempting at the time the train started, to pass from it to the platform, was, in consequence of the sudden and rapid motion of the cars, thrown suddenly and violently against and upon said platform, and received great bodily harm, etc.

The answer denies all the material allegations of the petition. The testimony was to the effect, that the plaintiff, who lived at Nevada, which was near a station on the defendant's road, accompanied his sister-in-law to the station, with a view to see her and her child safely on the cars, on the night of the 15th of May, 1872; that the train was behind time by half an hour or more; that on its arrival, the plaintiff, who was on the platform with the lady under his charge, discovered that the ladies' car did not get within ten feet of the platform, and therefore conducted the lady and child to an opening which led to the car immediately behind the baggage or express car, and passed through that car, and perhaps another, until he reached the car next to the sleeping-car; that as soon as the lady was seated, he turned back, and, without having

observed that the train was in motion, attempted to get out on the platform, and was thrown or fell upon it and injured.

The evidence in regard to the length of time the train stopped, and as to any signal being given before starting, either by the usual proclamation from the conductor of "all aboard," or by ringing of the bell, was conflicting. The time the train was stopped was, according to all the witnesses, however, between two and five minutes, and the conductor stated that after his cry of "all aboard," he waved his lantern to the engineer as a signal to move. The customary delay at the station of the express train was, according to the statements of the officers, about two and a half minutes.

The court, at the request of the plaintiff, instructed the jury as follows:

1. "The court instructs the jury, on the part of plaintiff, that it was the duty of the railroad company, as a common carrier of passengers, by its agents and employees, to have so stopped the passenger cars at the platform, at the depot, as to have made it safe for ingress and egress of passengers going to and from the same; and also to stop the cars for a sufficient length of time to get on and off the cars with safety, and before starting to have given a signal of starting, for such reasonable length of time as to have enabled passengers to get on with safety, and persons to get off with safety, and if the jury believe from the evidence that the plaintiff, as the conductor of his sister-in-law and her infant child, who were taking passage on said cars, put said sister and child as soon as he could, after the train stopped, on the cars, and immediately left and attempted to pass from the cars to the platform, and that the cars were started without giving reasonable length of time to get off, and without giving the usual signal of starting, and that in consequence of such negligence on the part of the employees of the company, the plaintiff was injured in getting from said cars, the jury will find a verdict for the plaintiff, and assess the damages at such amount as they may believe from the evidence that the plaintiff has sustained, not to exceed \$10,000."

2. "The court instructs the jury, on the part of the plaintiff, that if they find for the plaintiff, they are not confined to the actual damages sustained by the plaintiff, but may take into consideration all the circumstances and facts detailed in evidence, and may give exemplary or punitive damages in such reasonable amount, above the actual damages sustained, as they believe the evidence warrants."

3. "If plaintiff used due diligence in getting from the car, and if the train was prematurely started without due and reasonable notice of such starting, and if the plaintiff was not conscious of the starting of such train when he attempted to step from the cars to the platform, then plaintiff is not the less entitled to recover on account of the time and manner of his stepping from the car."

The court refused the following instructions asked by defendant. 1. "If the jury believe from the evidence, that plaintiff was not a passenger on defendant's cars, it was not necessary for him to be notified of the time of the departure of the cars." 2. "That the defendant is not bound to use the same degree of care in regard to the plaintiff, a stranger who voluntarily went upon its cars for the purpose of seeing his sister safely started, that it is to passengers." 3. "That if the jury believe from the evidence, that the plaintiff voluntarily went upon defendant's cars, without the intention of becoming a passenger, and voluntarily left defendant's cars, and was injured while voluntarily leaving said cars, while they were in motion, he can not recover." 4. "That if the jury believe from the evidence, that plaintiff was not a passenger on defendant's cars at the time of the alleged injury, then it devolves upon him to prove that he was on said cars by authority of some person connected therewith, or that it became necessary for him to go upon defendant's cars at that time, before he can recover. And the mere fact that he went upon the cars for the purpose of seeing his sister seated, without proving the necessity of so

doing, but was injured in leaving the cars while they were in motion, will not entitle him to recover."

To the action of the court in refusing those instructions, the defendant duly excepted.

The court of its own motion gave the following instructions: "That if the jury believe from the evidence, that plaintiff was not a passenger on defendant's cars at the time of the alleged injury, it devolves on plaintiff to prove that he was on the cars by authority of some person connected therewith, or that it became necessary for him to go upon said cars, and plaintiff can not recover, unless they should believe from the evidence, that it was necessary for him to go on the cars to seat his sister-in-law and child, and the jury are to consider all the circumstances of the case as to whether it was necessary or not for plaintiff to go on the cars."

The defendant duly objected and excepted to the giving of all the above instructions.

The verdict was for plaintiff and the damages assessed at \$1,600. Motions for new trial and in arrest were made, which were overruled, and the case is brought here by appeal. The decision of this case depends entirely upon the propriety of the instructions given to the jury, and it is obvious that the judgment must be reversed on account of the second instruction given for the plaintiff on the subject of punitive or vindictive damages. We have decided that such damages may be warranted against a corporation as well as against an individual, where the circumstances of the case authorize them. *Perkins v. M. K. & T. R. R. Co.*, 55 Mo. 214. Therefore, where the agents of a corporation act wantonly or maliciously, the corporation may be held to answer in exemplary damages. But there was no evidence in this case tending to prove any intentional wrong to plaintiff; in fact it appears affirmatively that the conductor was not aware that the plaintiff was on the train, nor so far as the evidence of the plaintiff himself shows, was the conduct of any of the officers or agents of the defendant in anywise influenced by any knowledge of the plaintiff's situation or of his wish to get off the train. An instruction, therefore, on the subject of punitive damages, was a mere abstraction; but perhaps not a harmless one, since the jury might well infer that the court in giving such an instruction, was of opinion that there was some evidence in the case to justify it.

The first instruction presents questions of more difficulty, upon which there has been no uniformity of opinion in cases adjudged as we have been able to find. It is clear that the same degree of care on the part of a railroad company exacted by the law in regard to passengers, is not required of them in regard to persons who are not passengers. In the latter case, nothing more is required than ordinary diligence. And whether there is a want of ordinary care in a particular case, depends so much on its attendant circumstances that a definite rule becomes difficult, if not impossible. The points of negligence averred and insisted on here are: 1st. The failure of the officers to put the passenger cars in connection with the platform, so that passengers could pass into and from them directly to and from the platform; 2nd. The failure to give notice, by signal or otherwise, to plaintiff, of the starting of the train; 3rd. The failure to stop the cars for a sufficient length of time to enable the plaintiff to get on and off the car.

It is intimated, and perhaps decided, in some adjudged cases, that a person occupying the position of the plaintiff, is in the position of a mere trespasser, on an implied license, and therefore, although the law requires of railroad companies, as common carriers of passengers, great exactness and care in regulating the departure of trains, and in the giving notice to passengers of such departure, yet such care is not required in relation to persons who are not passengers, or not upon the premises at the instance or request of the company. And it was accordingly held in the case of *Lucas Admr. v. T. & N. R. R. Co.*, 6 Gray, 64, that "the

rules and regulations presented by a railroad company in relation to the departure of trains and for giving notice to passengers, do not extend to persons who are not passengers, with or without compensation, or who are on the premises without request or instance of the company, and therefore the omission to comply with such regulation is no ground of complaint by one who is not a passenger, if under the circumstances, the company used ordinary care;" and further, "that the law has not imposed upon the railroad company the duty of giving special notice of the train to leave, to persons who are not passengers, with or without compensation, or who are not there at the instance of the company; nor of prescribing by rules a system or method for giving such notice to such persons."

"Persons entering the cars who are not passengers, and without the request or instance of the company, are bound to know the time of departure (if such time be fixed, and reasonable public notice given thereof), and to leave the cars in such season before the time so fixed, as would enable them to get off with care before the cars are set in motion. With the arrival of the time fixed for the departure of the cars, the implied license or permission ceased, and with it the liability of the defendant, except in cases of misfeasance or gross negligence." This was said in a case where a lady had conducted and assisted into the cars her aunt who was aged and infirm, and affected by disease of the heart, and unable to enter the cars without assistance, and upon leaving and attempting to step on the platform after the cars had commenced moving, was precipitated under the wheels, and her arm and leg severed from her body. The court held she had no cause of action, upon the ground that she was on the cars merely by license or permission, and because in such cases she attempted to leave the cars after they were put in motion. Whether the usual signals for leaving had been given or not, was treated as an enquiry of no importance, on the ground that the lady (plaintiff) was where she had no right to be—that was, on the steps of the car.

We should be very reluctant to hold, that an aged or infirm mother, or sister or wife, or indeed any other woman, especially if incumbered with an infant child, should not be allowed the assistance of a male friend or relative in getting a seat upon a railroad car, and that such friend or relative was to be treated as a mere stranger to the company, having no claim upon the company for an injury under any circumstances. Not being a passenger, it is conceded that no extraordinary care was required; but whether the neglect of customary signals would not amount to ordinary negligence, is a matter upon which the Massachusetts decision is not satisfactory.

The doctrine of the Supreme Court of Pennsylvania in *Gillis v. The Pa. R. R. Co.* (8 Am. L. Reg. N. S. 729, decided in 1869), seems more consonant with justice.

In that case, a platform connected with the depot at Johnstown extended over a canal, or a chasm once used as a canal, and on the occasion of President Johnson's arrival in the cars, a multitude of people gathered on this platform to hear the President's speech, and the timbers which supported it gave way, and a number of persons were precipitated into a chasm, some of whom were killed, and others seriously injured. The court held, however, that the company owning the road was not responsible to the persons injured, who came through curiosity and had no business with the road; but as to persons who came on the platform to meet or part with passengers, the court held the company bound to have the structure strong enough to bear all who could stand upon it. The judge observed: "Had it been the hour for the arrival or departure of a train, and he (the plaintiff) had gone there to welcome a coming or speed a parting guest, it might very well be contended that he was there by authority of the defendants, as much as if he was actually a passenger, and it would then matter not how unusual might have been the crowd, the defendants would have been responsible. As to all such persons to whom they stood in such a relation as required care on their part, they were bound

to have the structure strong enough to bear all who could stand on it. As to all others they were liable only for wanton or intentional injury. The plaintiff was on the spot merely to enjoy himself, to gratify his curiosity, or to give vent to his patriotic feelings. The defendant had nothing to do with that."

This seems the more reasonable doctrine, and is sanctioned by the recent English cases of *Gautrel, Adm'r v. Egerton*, Law Rep. 2 C. P. 371; *Holmes v. N. E. R. Co.*, Law Rep. 4 Exch. 254. And if a person who visits a railroad train to welcome a coming guest, or speed a parting one, is held to have claims on the railroad company for ordinary care, surely one who attends a female passenger, incumbered with an infant and a satchel, is entitled to hold the company to equal responsibility.

The first part of instruction number one, given for the plaintiff in regard to the duties of defendant in relation to its passengers, though abstractly correct, was outside of the case on trial. That instruction declared that "it was the duty of the railroad company, as a common carrier of passengers by its agents and employees, to have so stopped the passenger cars at the platform of the depot, as to have made it safe for ingress and egress of passengers into and from the same."

This is true; but the plaintiff was not a passenger, and no injury happened to the lady who was a passenger, by reason of the failure of all the passenger cars to be placed within reach of the platform. But the plaintiff was entitled to have sufficient time to escort the lady under his charge to her seat, and then leave the cars. If the time was not enough, or if the defendant's agents failed to give notice of the starting of the train by the usual signals, of an oral cry of "all aboard" from the conductor, and the ringing of the bell by the engineer, it was not such ordinary care as the defendant was bound to exercise, both towards passengers and persons in the situation of plaintiff. And these questions of fact were therefore properly submitted to the jury by the court.

Whether the attempt of plaintiff to step from the cars when the train was in motion, was, under the circumstances of the case, such negligence as would relieve the defendant of all responsibility for accident, is a question of fact for the jury, as this court held in the case of *Wyatt v. Citizens R. R. Co.*, 55 Mo. 485; *Karle v. K. C.*, St. Jo. & B. R. R., Id. 476; *Loyd v. Han. & St. Joe. R. R. Co.*, 53 Mo. 509; *Burham v. St. Louis, I. M. R. R.*, 56 Mo. 338. These are risks which the most prudent men will take, and the plaintiff will not be barred of a recovery for his injury, if he adopted the course which most prudent men would take under similar circumstances. For a person to jump from a car, propelled by steam, when it is in rapid motion, may be regarded as mere recklessness; but to step from a car not yet beyond the platform, and whose motion is so slight as to be almost or quite imperceptible, may not be negligence, and whether it is or not, is for the jury to decide from the physical condition of the person, and all the attendant circumstances. A young, healthy and vigorous man may assume risks which would be culpable negligence in another of feeble health or protracted age. *Shearm. and Redf. Neg.*, Ch. 30; *Foy v. Brighton R. R. Co.*, 18 C. B. N. S. 225; *Filer v. N. Y. Central R. R.*, 49 N. Y. 47.

If the first instruction asked by defendant is understood to mean any special notice to plaintiff, it was correct and should have been given. It was the plaintiff's business to make himself acquainted with the usual delay of the train at Nevada, and with the usual signal for the starting of the train, and if that signal was given in time for plaintiff to have left the cars, his delay was at his own risk. It was impossible for the conductor to know that the plaintiff, in going on the cars, did not intend to go as a passenger. He was therefore entitled to no other notice than such as was given to passengers, to enable them to get on and off the cars.

The third and fourth instructions asked by defendant were properly refused.

The judgment is reversed and the cause remanded; the other judges concur.

## Removal of Causes to the Federal Courts — Eminent Domain.

ANDREW WARREN, JR., v. THE WISCONSIN VALLEY RAILROAD COMPANY.

*United States Circuit Court, Western District of Wisconsin, August 5, 1875.*

Before Hon. JAMES C. HOPKINS, District Judge.

A proceeding instituted by a railroad company in a state court to condemn land for its use, may be removed to the federal circuit court, under the acts of Congress applicable to the removal of causes, where the land-owner, who petitions for such removal, is a resident of another state.

The facts are stated in the opinion.

Wm. F. Vilas for plaintiff; W. C. Silverthorn and P. L. Spooner, for defendant.

HOPKINS, J.—The railway company above named required certain portions of the plaintiff's land for the purpose of its road, and not agreeing with him upon the damages to be paid therefor, had them appraised by commissioners, according to the provisions of the railroad law of this state (chapter 119, general laws of 1872). The company had separate awards for each tract or government discription through which it ran, being six in number. The plaintiff not being satisfied with the amount awarded by the commissioners, appealed to the Circuit Court of Marathon County, from each award, in accordance with the provisions of the act aforesaid.

After the appeals, the plaintiff being a citizen of the state of Illinois, filed his petition in the state circuit court, stating that he was a citizen of the state of Illinois, and that the railroad company was a citizen of this state, also that the amount in dispute exceeded the sum of \$500 in each case, and prayed for the removal of the cases for trial into this court. The state court granted the order and accepted the bond, and copies of the records in each case were filed, and the case duly docketed in this court.

The plaintiff now moves to consolidate said cases, which motion is opposed by defendants, on the ground that this court has not jurisdiction; but conceding that if the court has, they should be consolidated. The defendant, in order to present the question directly before the court, moved to remand the causes to the state circuit court, for the reason that this court had not jurisdiction thereof.

Section 17 of the state statute aforesaid, provides for an appeal by either party, and declares that upon filing a written notice of appeal in the office of the clerk of the circuit court of the county in which the land is situated, and where the award of the commissioners is required to be filed and recorded, "the appeal shall be considered an *action* pending in court subject to a change of the place of trial and appeal to the supreme court as other actions, and shall be entered by the clerk upon the records of the court by setting down the owners of the land for which such award was made, and who are parties to the appeal as plaintiffs, and the railroad company as defendants." It further declares that the appeal shall be tried by a jury unless waived, and that costs shall be awarded to the successful party on such appeal, and that judgment shall be rendered thereon, according to the rights of the parties.

The award is to be recorded in the judgment-book by the clerk in whose office it is filed. If the award is not paid in sixty days from the filing, or in case of appeal, if the judgment upon the appeal is not paid within sixty days, the plaintiff or party interested may have execution thereon. Section 19 provides, that upon the railroad company's paying into court the amount of the award or judgment, or filing in the clerk's office of the court a receipt therefor, duly signed and acknowledged by the owner, the clerk shall make a minute of such payment or filing of such receipt at the foot of the record of the report of the commissioners, in the judgment-book of said court,

and that thereupon the exclusive use of such premises shall vest in the railroad company without any further act, deed or conveyance, and further declares that such record or a certified copy thereof shall be *prima facie* evidence of such title in all courts and places.

The motion to remand was based upon two grounds: First, that as it was a proceeding by the state in the exercise of its right of eminent domain, the case was to be regarded as substantially against the state, and that this court had no jurisdiction in a suit against a state. This position is correct, if the state is a party. But I do not see how that can be maintained. The state statute above quoted, declares that the railroad company shall be defendant, and that when it pays the amount of damages or compensation awarded by commissioners, or by the court on appeal, the title or use of the land shall vest exclusively in the railroad company. The state has no interest in the controversy. It is not a controversy where the state is a party nominally or beneficially. The state conferred upon the railroad company the right to take what lands it required, but made it liable for all damages and compensation; and this controversy relates, not to the right of the railroad company or the state to take the lands described, but only to the amount of compensation the railroad company must pay as a condition of the taking. It seems very clear to my mind, that this is not a suit prosecuted against a state, within the meaning of the constitution, and that, therefore, the first ground of objection is not well-taken.

The second ground relied upon was, that it was not a suit in such a sense as to be removable; that it was a special proceeding, provided for ascertaining the damages, and passing title to the land taken or condemned—especially applicable to proceedings in the state courts, and not adapted to the practice and mode of procedure in this court; and that the rights of the railroad company could not be obtained in the manner provided by the state statute, in this court. If this objection states truly the essential nature of the case, it might be regarded as an answer to the jurisdiction of this court. But does it? It was suggested that the state could have provided for an assessment of damages by a sheriff's jury, and not given to the proceedings any attribute of a suit. Without determining that question either one way or the other, the point to be passed upon here, is, has the state stripped the proceedings of all the characteristics of an action? I think it has not. It is true, the mode of getting the case into the courts is different, but after having provided a way of getting the matter into court, it is then treated as an action. The act says, "the appeal shall be considered as an action pending in court," and from that time it is proceeded with in the same manner as other actions up to, and including judgment and execution. The owner of the land is the plaintiff, and the railroad company, defendant. So it seems to me the state has invested the proceedings, with the dignity and attributes of an action, and the parties are not, therefore, at liberty to say it is not an action. The state has given the parties the plenary advantages of an ordinary suit at law, and the courts have but to see that they enjoy them.

But, even if the proceedings in the state courts are different from the usual modes of prosecuting suits for the enforcement of private rights, still it is in effect a suit of a civil nature, in which the controversy is between citizens of different states. The plaintiff is seeking to obtain compensation of the defendants for the land it had taken from him. It involved the question of the value of the land taken by defendants, and the damages of the plaintiff sustained thereby. It is not a new right of action given by the state. The common law gave a remedy by action in such a case, and the state legislature, by changing the mode of proceedings to ascertain the damages of a party whose lands have been taken, cannot change the essential character of the cause of action or right of action. It is still in effect a suit of a civil nature, where a judgment may be rendered, which concludes the parties as in

other suits. The status of the parties is, I think, the same as in any suit of a civil nature at common law.

It was the intention of Congress, under the power conferred by the constitution, to give to suitors having a right to sue in the federal courts, remedies co-extensive with such rights. These remedies can not be abridged or controlled by state legislation by exempting a person or corporation of such state from suit. A citizen of another state, in this respect, possesses a right not pertaining to one of the same state. *Suydam v. Broadnax*, 14 Peters, 67; *Railway Company v. Whitton*, 13 Wallace, 270. In this last case it was held that where the state statute gave a new right of action, and limited the prosecution for its recovery to a court established by the state, that the party plaintiff, being a non-resident, was entitled to a removal of the case from the state to the federal courts for trial. The supreme court in that case lays down the doctrine, that "when a general rule as to property, or personal rights or injuries to either is established by state legislation, its enforcement by federal courts in a case between proper parties, is a matter of course, and the jurisdiction of the court in such case is not subject to state limitation."

But as I have before said, this plaintiff has a plain right and remedy for his damages in such a case as this at common law; and the supreme court in the *Union Bank of Tennessee v. Jolly's Administrators*, 18 How. 306, declared that a law of a state "limiting the remedies of its citizens in its own courts, can not be applied to prevent the citizens of other states from suing in the courts of the United States in that state, for the recovery of any property or money thereto, to which they may be legally or equitably entitled."

It may be that the proceedings in this court, in ascertaining and enforcing the parties' rights will be different to some extent, but that does not prevent the removal. The supreme court has repeatedly held that the jurisdiction of the federal courts over controversies between citizens of different states, can not be impaired by the laws of the states which prescribe the modes of redress in their courts. In *Hyde v. Stone*, 20 Howard's Rep., 175, it is said in many cases, "the forms of the proceeding in these courts (federal courts), have been assimilated to those of the states, either by legislative enactments or by their own rules. But the courts of the United States, are bound to proceed to judgment, and to afford redress to suitors before them, in every case to which their jurisdiction extends. They can not abdicate their authority or duty in any case in favor of another jurisdiction." So that if this court could not assimilate its practice, so as to give to the defendant all the rights it is entitled to, in the mode prescribed by this state statute, it is no answer to its jurisdiction, for it is the duty of this court to afford a sufficient and adequate remedy so as to secure to the defendant the right to which it is entitled, upon paying the judgment finally rendered in the case, and there is no difficulty whatever in determining the remedy to effect that purpose. *Payne v. Hook*, 7 Wallace, 425.

The 12th section of the judiciary act of 1789, gave the right of removal to non-resident defendants. That was not as comprehensive as the constitutional provision on the subject, and Congress has from time to time extended the right, and the act of March 3, 1875, has materially enlarged the right of suitors in respect to removal. Chap. 137, of the laws of 1875; 18 Statutes at Large, page 470. It now embraces citizens of other states whether plaintiff or defendant, and confers an unqualified right to have a case or suit of a civil nature at law or equity transferred on petition of either party to the federal courts for trial, when the parties are citizens of different states, upon complying with the conditions mentioned in the act; and the supreme court decided in *Insurance Co. v. Dunn*, 19 Wallace, 214, and *Ins. Co. v. Morse*, 20 Wallace, 445, "that no power of action remained thereafter, (after filing petition) to the state court, and that every question, necessarily including the act of its own jurisdiction, must be decided in the

federal court." To the same effect is the case of *Osgood v. The Chicago, D. and V. R. R. Co.*, 2 CENT. L. J. 275.

Applying the doctrine and principles of those decisions to this case, I must overrule the motion to remand the cases to the state court, and hold that this court has jurisdiction thereof.

Having held that this court has jurisdiction, I grant the order conceded to be right by defendant's counsel, consolidating said cases.

### Estoppel in Pais—Estoppel against a State.

THE PEOPLE OF THE STATE OF ILLINOIS v. ARISTUS BROWN ET AL.\*

*Supreme Court of Illinois, January Term, 1873.*

Hon. SIDNEY BREESE, Chief Justice.

" PINCKNEY H. WALKER,  
" A. M. CRAIG,  
" JOHN SCHOLFIELD,  
" JOHN M. SCOTT,  
" BENJAMIN R. SHELDON,  
" WILLIAM K. MCALLISTER.

} Associate Justices

1. **Estoppel in Pais.**—The doctrine of estoppel is that when a person, by his words or conduct, voluntarily causes another to believe in the existence of a certain state of things, and induces him to act upon that belief, so as to change his previous position, he will be estopped to aver against the latter a different state of things.

2. **Elements of.**—In order to create such estoppel, the following elements must be present: 1. There must have been a representation concerning material facts. 2. The representation must have been made with a knowledge of the facts. 3. The party to whom it was made must have been ignorant of the truth of the matter. 4. It must have been made with the intention it would be acted upon. 5. And it must have been acted upon.

3. **Principal Element is Fraud.**—The representation must be external to, and not necessarily implied in the transaction itself; and fraud or something tantamount thereto, is the distinctive character of this kind of estoppel.

4. **Doctrine of, does not apply to the State.**—Public policy, to prevent loss to the state through the negligence of public officers, forbids the application of the doctrine of estoppel to the state, growing out of the conduct and representations of its officers. On the same ground that the government is excused from the consequence of *laches*, it should not be affected by the negligence or even wilfulness of any one of its officers.

5. **Case in Judgment.**—Where the auditor, when applied to by the sureties of a collector, gave them, through mistake, an incorrect statement of the collector's account, which prevented them from obtaining indemnity: *Held*, that such mistaken statement could not estop the state, in a suit upon the collector's bond against such sureties, from recovering the true amount due the state.

This was an original suit in this court, by the State against Aristus Brown, Clark W. Upton, Moses Evans and Lorenzo Hinkston, as sureties, upon the official bond of Walter W. Hastings, sheriff of Lake county.

The case was submitted upon an agreed state of facts.

Mr. J. K. Edsall, Attorney-General for the people; Mr. E. M. Haines, for the defendants.

Mr. Justice BREESE delivered the opinion of the court:

This is an original suit in this court, by the people, against the sureties of the sheriff of Lake county, on his official bond, a defalcation by the sheriff in paying over a portion of the state revenue collected by him, being alleged in the declaration.

Formal pleadings were waived by the parties, and a decision sought upon an agreed state of facts, which brings up the question, and it is the only question in the case: Can the mistake of the auditor of the public accounts, in stating the account of the sheriff, by which the defendants were prevented from obtaining indemnity from the sheriff, be pleaded as a defence to this action?

The defendants have submitted no argument to sustain their defence.

The attorney-general, on behalf of plaintiffs, claims that the fact that defendants were prejudiced by the erroneous and mis-

\*From advance sheets of 66 Illinois Reports, received through the courtesy of Hon. Norman L. Freeman, Reporter.

taken information they received from the auditor, would not constitute a defence even as between natural persons, so long as such officer acted in good faith, and without intention to deceive—that the doctrine of estoppel *in pais* is based upon a fraudulent purpose, and a fraudulent result, and if the element of fraud is wanting, there is no estoppel. There must be deception, and change of conduct in consequence, in order to estop a party from showing the truth; citing 2 Story's Eq. Jur. sec. 1543.

The doctrine on this subject we understand to be, that, when a person, by his words or conduct, voluntarily causes another to believe in the existence of a certain state of things, and induces him to act upon that belief, so as to change his previous position, he will be estopped to aver against the latter a different state of things. Text writers denominate this estoppel by conduct, in order to which *all* of the following elements must be present: 1. There must have been a representation concerning material facts. 2. The representation must have been made with knowledge of the facts. 3. The party to whom it was made must have been ignorant of the truth of the matter. 4. It must have been made with the intention it should be acted upon. 5. It must have been acted upon. In this connection, it is said, the representation here spoken of is one external to, and not necessarily implied in, the transaction itself, and fraud, or something tantamount thereto, is now the distinctive character of this kind of estoppel. Bigelow on Estoppel, introduction, p. 60.

Some of these necessary elements appear in this transaction, but the essential one, fraud, is wanting. There is no pretence the auditor designedly misrepresented the state of the sheriff's account, and the extent of his liability. That officer is presumed to employ competent clerks and assistants, on whose fidelity and accuracy he must, in most cases, implicitly rely, and must base his official statements on such communications or reports as they make to him. If they err, as they may sometimes, the error goes into his statements, and without any just impeachment of his fidelity, may be the cause of loss and injury to another.

As between individuals, it is no doubt true, if one, by words or conduct, wilfully causes another to believe the existence of a certain state of things, and induces him to act upon it so as to change his previous condition, he will be estopped to deny the truth of the representation. As between the government and an individual, we have found no case holding the former would be estopped by any statement of its officials from recovering its own.

It is a familiar doctrine, that the state is not embraced within the statute of limitations, unless specially named, and, by analogy, would not fall within the doctrine of estoppel. Its rights, revenues and property would be at fearful hazard, should this doctrine be applicable to a state. A great and overshadowing public policy of preserving these rights, revenues and property from injury and loss by the negligence of public officers, forbids the application of the doctrine. If it can be applied in this case, where a comparatively small amount is involved, it must be applied where millions are involved, thus threatening the very existence of the government.

The doctrine is well settled that no *laches* can be imputed to the government, and by the same reasoning which excuses it from *laches*, and on the same grounds, it should not be affected by the negligence or even wilfulness of any one of its officials.

The state not being estopped by the mistaken statement of the auditor, judgment must be entered for the plaintiffs for the amount admitted to be due, without interest, namely: twelve hundred dollars and fifteen cents, for which execution will issue.

#### JUDGMENT FOR THE PLAINTIFF.

—PAPERS have been filed by Britton, Gray and Drummond, in the land office at Springfield, Illinois, laying claim to a portion of the land on which stands the City of Chicago. They have been forwarded to the general land office at Washington, but will not be reached for a month or two.

#### Selections.

JUDICIAL LEGISLATION AND ITS EFFECTS.—The term judicial legislation is more applicable to decisions of courts of last resort than to other courts whose decisions may be reviewed by appeal or writ of error. Public opinion and self-respect are all that prevent courts of last resort from being as arbitrary as the most wicked and cruel tyrant that ever lived, and as unstable as the wind "which bloweth where it listeth." Seven tyrants are seven times as bad as one tyrant, because their acts are sanctioned by numbers, and this gives an appearance of right, and popular opinion may therefor say they "all concurred," without knowing the reason or motive which induced it. Our state constitution which establishes our courts and law-making power designates what our laws are, and what they shall be under it. Our law must be the common law of England subject to such *changes* as the *legislature* have made or may make, limited only by the state constitution and the laws and government of the United States (Art. 1 sec. 17).

Judicial legislation, besides being without authority, is very harmful and unjust, but it must be very extended in order to be felt sufficiently to have public opinion expressed against it. The old court of errors of this state, which existed for seventy years was at last destroyed by public opinion in 1847.

The principle reason that produced the constitutional convention of 1846, was to obtain a more harmonious and reliable system in the administration of justice. The court of errors was accused of a disregard of the *stare decisis*, and this was claimed to be the effect of allowing the court of last resort to be composed of many persons who were not lawyers, and that a court should be organized that will not be "unstable in its decisions," and that "will not fail in paying all respect to uniform rules and established precedents." Argus Debates, 372.

The conduct of the court of errors was also criticized by the supreme court in *Bu v. Van Wyck*, 1 Hill, 438.

In regard to judicial legislation the court in 1 Hill, 459, said: "Statutes are usually made to operate prospectively, and do not disturb rights already acquired. But when the law is changed by judicial decision, especially on a question of such widely extended influence as that relating to conveyance of personal property among a commercial people, it is impossible to foresee all the evil consequences which may follow. Such decisions act upon the past, as well as the future, and no man can feel secure in a community where that which is settled law to-day may be overthrown to-morrow, in a mode which has an *ex post facto* operation, and thus either legalizes acts which were originally void or makes those things vicious which were faultless when they happened. To say nothing of personal security, there can be no stable title to property where great and sudden changes in the law are brought about without the intervention of the law-making power."

The Lord Chancellor of England says: "By the constitution of this United Kingdom, the House of Lords is the Court of Appeal in the last resort, and its decisions are authoritative and conclusive declarations of the existing state of the law, and are binding upon itself, when sitting judicially, as much as upon all inferior tribunals. \* \* \* The doctrine on which the judgment of the house is founded must be universally taken for law, and can only be altered by act of Parliament." 6 Jurist, N. S. 834.

The court said in 1 Hill, 462: "It may be remarked in relation to the House of Lords when sitting as a court of review, that it not only abides by its own judgments, but considers itself bound by the law as it has been settled by other courts, whatever may be its own notions of the matter as an original question. \* \* \* When there has been a uniform 'course of decisions' in England, on a statute or any other branch of the law, especially in cases where those decisions affect the title to property, the House of Lords, however erroneous those decisions may be deemed, does not feel itself competent to apply a remedy without the concurrence of the House of Commons."

The judge then mentions a number of reported cases, showing that the court for the correction of errors did not abide by its own decisions, and then continues: "These examples are sufficient to show that our court of dernier resort does not regard its own decisions as conclusive by way of precedent; and if not so regarded by that court, it would be strange, indeed, if other courts were bound to follow them at all events, and without looking into the reasons on which they stand." There is a further reason why the decisions of the court for the correction of errors should not be implicitly followed. It is well known that some of the members of that court do not consider themselves tied down to what are sometimes called the strict and technical rules of law, but feel at liberty to decide according to their own sense of what is right in the particular case under consideration, without much regard to legal precedents. That this sentiment has not often found its way into reported cases may be accounted for by the fact that it is more commonly adopted by those members of the court, who are not in the habit of preparing written opinions, than by others, and besides, cases in which such opinions have been expressed—to say nothing of those in which such opinions have been acted upon in silence—would be less likely to be reported than others, for the reason that lawyers—to which fraternity reporters usually belong—are in the habit of adhering with much zeal to legal precedents. 1 Hill, 464.

The court of errors defended or excused itself against the above in the case of *Hanford v. Artcher* (4 Hill, 271).

The chief cause of litigation is to ascertain what the facts are, when these are settled by a trial or otherwise.

There is no reason why the administration of the law upon them should not be an exact science. There are definite rules for statutory construction, for statutes need not be drawn indefinite and uncertain; and as to all other law it is an old and true definition that law is the perfection of reason, and it is established by precedents. In almost every question of pure law the premises are settled, and but few cases in the court of appeals can be reviewed on questions of fact, and if all the courts were always to reason with correctness, no decisions would be reversed, no judgments overruled, and all would arrive with certainty at the same conclusion.

It may be remarked in closing, that Blackstone has truly said that if ever the constitutional government of England was destroyed, it would be because the legislative department was more corrupted than the judiciary and the executive. We may say of our American constitutional governments, that they can never be destroyed unless the supreme judicial departments are corrupted or negligent of their duty, and this may be in concurrence with the legislative department, or may be independent of it.

All persons who desire to preserve our existing systems of constitutional government must be in favor of each of the three departments—the legislative, the judicial, and the executive—being kept distinct and separate. It requires no historical examples to call to mind the importance and value of this principle of good government.—[*The Daily Register*.

### Correspondence.

#### DELAY OF BUSINESS IN THE SUPREME COURT OF THE UNITED STATES—ANOTHER SUGGESTION.

JACKSON, MISS., Aug. 10, 1875.

EDITORS CENTRAL LAW JOURNAL:—I am glad to see public attention called to the defects in the judiciary system of the United States. The delay involved in appealing a case to the supreme court, with the cost and attendant difficulties, amounts to an absolute denial of justice in a large number of cases. Besides, the recent act of Congress limiting the right of appeal, can only be justified upon the ground that the supreme court would be unable to dispose of the business which would otherwise be brought before it. This reason demonstrates the inefficiency of the system,

and its inadequacy to the present wants of the people. If the members of the bar throughout the United States will take the matter in hand, I feel quite confident that Congress will provide some plan by which the grievance can be remedied. I beg to suggest the following:

1. Abolish the several circuit courts, and clothe the district courts with the jurisdiction now confided to the circuit courts, in addition to their own, so that we shall have nothing but the district courts in the several states.

2. Organize in each judicial circuit a court of appeals, to be composed of one of the justices of the supreme court, and two or more additional judges. For instance, the present circuit judges, and one or more of the district judges.

3. Extend the right of appeal, or of persecuting writs of error to all cases civil and criminal.

4. Let an appeal or writ of error lie from the court of appeals in all cases where the principle of the sum in controversy amounts to \$10,000, or whenever the constitutionality of an act of Congress, or of some state law is involved, or in those cases, in which the court of appeals may think the public interest requires it.

5. In cases at law, give to litigants the right to make motions for a new trial, and to except to the judgments of the district court in granting or refusing the same, to the end that such judgments may be reviewed. In other words, adopt the Mississippi statute upon this subject. It is next to impossible now to present any case at law fairly before the supreme court, inasmuch as the finding of the lower court is conclusive of the facts involved. Under our law you get your whole case before the appellate court.

6. Let the jurisdiction of the Supreme Court of the United States remain in all other respects as it now is.

The effect of the present system is to drive litigants from the United States courts; under that proposed, they would rather prefer them. The plan suggested would not necessitate the displacement of a single judge, and could be readily perfected. I hope the subject may excite the attention of lawyers generally.

W. L. NUGENT.

#### RESPONSIBILITY OF INSURANCE COMPANIES FOR THE FRAUDS OF THEIR AGENTS—*LEE V. GUARDIAN LIFE INSURANCE CO.*

LOUISVILLE, KY., August 12, 1875.

MESSRS. EDITORS:—In the CENTRAL LAW JOURNAL of date, the 30th of July, 1875, pp. 495 to 498, I find reported the charge of Mr. Circuit Judge Sawyer, of the United States Circuit Court, for the District of California, to the jury sworn to try the case of *Hannah Lee v. Guardian Life Insurance Company*.

Your editorial commendation of the "high judicial tone" of the charge made my surprise all the greater, when I read the language of the learned judge:

"I instruct you, gentlemen, that a waiver or matter of estoppel, to be effectual, must be made by an officer or agent of the defendant authorized to make it. If there has been no evidence of any waiver or matter of estoppel of this kind, except by a local agent only, employed to solicit applications, there must be additional proof of specific authority given him, or the company will not be bound. Unless Mr. Wright had authority to thus represent to this party, and to prevent him from knowing the answers that were given, and to induce him to sign, in ignorance of the answers, even if he did it, it is not binding upon the company, and it is not estopped by that act."

In short, this means, that in the opinion of Judge Sawyer, the insurance company must say expressly to its agent, "go and commit this, that, and the other fraudulent act, upon applicants," and the agent must precisely pursue instructions, or the company will not be in any wise affected by any wrongful acts. We should have had difficulty in finding a reason for so wide a departure from the legal rules and principles applicable to agencies, where only individual members of society are concerned; but further on Judge Sawyer states his reason to be that, otherwise insurance companies "will be at the mercy of any of the multitude of per-

sons it necessarily employs, who choose to practice these frauds upon it."

Inasmuch as the companies themselves select and voluntarily (and not otherwise "necessarily" than as their private interest seems to require), employ these agents and pay them, the justice of saying that outsiders who deal with them shall guarantee their good conduct, rather than the company that sends them out, is not very obvious, unless it be to that class who think that the insurance companies, rather than the people, need protection—a class that must be small and confined exclusively to insurance circles, and to those who have little *practical* acquaintance with the manner of working insurance business.

It is obviously just that no applicant guilty of a fraud shall be entitled to recover on a policy obtained by that means, but it is remarkable to announce that where the applicant is entirely truthful and innocent, and the company's agent is guilty of a fraud in which the applicant in no degree participates, the insured cannot recover unless he proves that the company expressly authorized the fraud; and yet that in effect is the general principle announced by Judge Sawyer.

Space will not admit of a discussion of the principles involved (although the subject is exceedingly interesting and important), but it will suffice to say, that a vast majority of the courts of this country have adopted as equally applicable to insurance companies as to individuals, certain familiar rules which have been well settled in the law of agency, but which application Judge Sawyer in effect denies. Among these is the doctrine "that the act of the agent is the act of the principal," and, that the *prima facie* presumption may be justly indulged by the applicant, that the authority of the agent is co-extensive with that of the company, from which will follow the result that the applicant is not bound to enquire as to any limitations upon the authority of the agent, but may safely rely upon the presumption stated as to the extent of the agent's authority, and deal with him as though he were the company itself.

The courts of Massachusetts and Rhode Island perhaps agree with Judge Sawyer, and possibly *dicta* in the later Connecticut cases may seem to favor him.

But whether this be so or not, and whatever may have been the justice of the case before Judge Sawyer, the following authorities would seem to refute the general doctrine he announced, in the most satisfactory and conclusive manner, as all who will take the pains to examine them will find. Many others to the same effect might be cited: *Franklin v. Insurance Co.*, 42 Mo. 457; *Combs v. Insurance Co.*, 43 do. 149; *Insurance Co. v. Maguire*, 51 Ills. 343; *Schettler v. Insurance Co.*, 38 Ills. 166; *Aurora, etc., Insurance Co. v. Eddy*, 55 Ills. 213; *Insurance Co. v. Jones*, 62 Ills. 458; *Insurance Co. v. Wilkinson*, 13 Wall. 222; *Insurance Co. v. Lyons*, 38 Tex. 271; *American Ins. Co. v. McLanathan*, 11 Kan. 549; *Rowley v. Insurance Co.*, 36 N. Y. 550; *McBride v. Insurance Co.*, 30 Wis. 563; *Olmstead v. Insurance Co.*, 21 Mich. 246; *Harris v. Insurance Co.*, 18 Ohio, 116; *Clarke v. Insurance Co.*, 40 N. H. 333; *Campbell v. Insurance Co.*, 37 N. H. 35; *Beebe v. Insurance Co.*, 25 Conn. 51; *Malleable Iron Works v. Insurance Co.*, 25 Conn. 465; *Woodbury Sav. Bk. v. Insurance Co.*, 31 Conn. 526; *Miller v. Mut. Ben. Ins. Co.*, 31 Iowa, 219. Cases in 26 Iowa, 69; 23 Penn. St. 50; 59 Penn. St. 116; 22 Mich. 146, 473; 27 Wis. 693; 25 Wis. 291, and 18 N. Y. 392, are to the same effect.

In the case of *Cheek v. Columbia Insurance Co.*, 1 CENT. L. J. 465, the Supreme Court of Tennessee recently, in a very clear manner, sustained views adverse to Judge Sawyer's, and in harmony with the cases above cited. A concise statement of this case may be found in 2 CENTRAL LAW JOURNAL, page 318, in an article which may be very profitably consulted in this connection.

The elementary writers strongly support what is known as the New York rule, rather than the Massachusetts rule, the former be-

ing the doctrine for which we contend. See May on Insurance, pp. 119, 120, 121, 143, 144, 605, 607, 609, 622, 623; 2d Phillips on Insurance, section 1876, and cases cited; 2 American Leading Cases, 915, 916, 917, 918, 919, 922. These authorities sustain the view, that there is no peculiar sanctity about insurance companies, nor their modes of business, that entitles them to exemption from the operation of the ordinary and well established rules governing agencies.

I may add that my only purpose has been to notice what is the general and *effective vice* in the charge of Judge Sawyer, and what seems to be the radically wrong tendency of the opinion expressed by him. Very respectfully,  
W. E.

#### RAILWAY NEGLIGENCE—KILLING CATTLE—OMISSION TO RING BELL OR SOUND WHISTLE.

EDITORS CENTRAL LAW JOURNAL:—In the case of *Owens v. H. & St. Jo. R. R. Co.*, 58 Mo., on page 392, the court, per Vories Judge, say: "If it was found by the jury that the bell had not been rung, nor the whistle sounded as the law requires, that was sufficient of itself to create a liability on the part of defendant, unless some contributory negligence was shown on the part of the plaintiff."

In the case of *Stoneman v. A. & P. R. R. Co.*, 58 Mo., on pages 504 and 505, the court, per Napton, Judge, say: "As a matter of law, the court correctly declared the failure to ring the bell, or sound the whistle at the point designated, was negligence; but whether that negligence occasioned the damage complained of, was a question of fact upon which the jury had a right to pass. The court had no right to declare as a matter of law, that the jury had nothing to find but the killing of the animal at a crossing of a public highway, and the failure of the company to have the bell rung or the whistle sounded. There may have been no connection whatever between the negligent omission and the damage, and the very terms of the statute indicate that the damage must be the result of the negligence."

It strikes me that these opinions require *reconsidering*. H.

### Summary of Our Legal Exchanges.

AMERICAN LAW REGISTER FOR JULY.\*

**The Law Applicable to the Negotiation of Contracts by Telegraph.**—Hon. Isaac F. Redfield has contributed an article to this number of the Law Register, under the above caption, preceded by the following synopsis of its contents:

- I. 1. The sender of a message for the purpose of initiating a contract, it would seem, should be held responsible for the correctness of the agency employed in its transmission.
2. Those cases which dissent from this rule, sometimes adopt the same principle, in holding the sender responsible when he employs a special operator.
3. The English courts adopt a different rule, not holding the sender bound by the errors in transmission.
4. The telegraph is the agent for the party in interest, whoever employs it.
5. Grounds of the English decisions discussed.
6. The reasons for the rule first stated seem to preponderate.
- II. At what time contracts negotiated by telegraph become complete.
1. A difference has been claimed between this and the mails, but without reason.
2. The delivery to the post office of the acceptance of a definite offer closes the contract.
3. The same rule has, with reason, been applied to negotiations by telegraph. Suggestions as to the mode or proof.
4. The reason of the thing and the decisions concur in there being no difference in negotiating contracts by mail and by telegraph.
- III. Discussion of the difference between the English and American decisions on this topic.
1. Statement of the English rule.
2. Reasons for dissenting from it. This mode of negotiating contracts between merchants, their agents and factors, has become so almost universal, both at home and abroad, that it becomes more and more important to have precise and definite notions in regard to the law applicable to such transactions.
- IV. The right to countermand, by telegraph, offers and acceptances sent by mail.

\* Philadelphia: D. B. Canfield & Co.

**Boundary—Middle of Highway or Stream.**—Woodman v. Spencer, Supreme Judicial Court of New Hampshire. Opinion by Ladd, J., followed by a commendatory note by Judge Redfield. [14 Am. Law Reg. (N. S.) 411.] Where a conveyance of land describes it as bounded by a stream not navigable, or by a highway, whatever terms may be used in describing such boundary, it must be construed as extending to the middle of the same, unless there is a clear expression of an intention to limit it to the margin of such stream or way. The reason of this rule is the strong and controlling presumption that it was not the intention of the grantor to retain in himself a strip of land subject to an easement in the public which might be perpetual, and therefore of no comparative use to him, and that it was equally not the intention of the grantee to cut himself off from the privileges of an adjoining owner in the fee of the highway, and to run the risk of leaving his land inaccessible in case the public easement in the road should be surrendered.

**Devise—Partition—Bill of Review—Res Judicata.**—Wadham v. Gay, Supreme Court of Illinois. Opinion by Sheldon, J. [14 Am. Law Reg. (N. S.) 419.] A testator devised to his nephew an estate in fee in remainder, to take effect on the falling in of three lives, and the devisee survived to take. After the testator's death, but before the estate in remainder became absolute, the nephew and his children were impleaded in a bill in equity for partition of the testate estate, and a decree passed purporting to be by consent, which, by mistake, erroneously declared the nephew's estate to be for life only, with remainder in fee to his children. That decree, made in 1851, omitted to order deeds to execute the limitations of estate thus declared to the children, and no such deeds were made. Afterwards a bill of review was prosecuted by the nephew, and there was a decree on that, reversing the partition decree. Soon after, the nephew's estate in fee under the will became absolute; and, he dying, his daughter sued out a writ of error, and on that procured a reversal of the bill of review decree, and then brought the present suit "to obtain execution of the decree in partition, and to supply the omission therein, which is necessary to the efficacy of the decree, as giving a remainder in fee to the children." The bill was against the purchasers, holding by deeds in fee from the nephew, or from his grantees, with warranty of title from him. *Held: First.*—Of those acquiring title while the bill of review decree was in force: 1. They were entitled to rely upon that decision, as the law which determined what estate they took by purchase. 2. The subsequent reversal of that decree did not affect their rights. 3. A decree need give no day to a minor to show cause against it; it is absolute in the first instance. *Barnes v. Hazelton*, 50 Ill. 429, approved. *Second.*—Of purchasers acquiring title while the consent decree in partition was in force, and before its reversal by decree in review: 1. As to such, the principle applies that, on a bill to execute a decree, the court will deny relief when it is seen the decree is unjust. And a decree, appearing to proceed by consent, where in fact there was none, and none was intended, can not be deemed fair and just. 2. A decree in partition in chancery, before the statute of 1861, could not pass a legal title to land; and such a decree, omitting to order deeds, is in that respect imperfect, and but the expression of a purpose without accomplishing or providing the means to accomplish the object. 3. Where there is no valuable consideration, a court of equity upon its general principles can not complete what it finds imperfect. 4. In the case of an intended gift of a legal estate, capable of a legal conveyance not made, the gift is revocable; there being a *locus penitentiae* as long as it is incomplete. 5. A gift or trust, capable of being made by a legal conveyance, is as imperfect when created by an executory decree providing no means of execution, as when created by an executory contract. 6. The prosecution of a bill of review to a decree, and also the making of warranty deeds in fee, by the nephew, were an exercise on his part of the right to revoke, while he occupied the *locus penitentiae*. 7. A consent decree, incomplete and ineffective, is not *res judicata*. For the court on an application to render it effective, to look into its real nature and character, does not militate with the doctrine of *res judicata*. If otherwise, the true nature of the bill would be to enforce a technical *estoppel*. 8. Though error of law shall not be alleged against a decree proceeding by consent, so as to reverse it; still, on an application to execute it, the court will look to see if it be rightful or not, in determining whether it will act or remain passive. Walker, Ch. J., and Craig, J., dissented. In a note, Judge Redfield expresses the opinion that the conclusion of the majority "rests upon most unquestionable grounds, both of principle and authority."

**Partnership Note—Liability of Endorser—Notice.**—Gates v. Beecher, Court of Appeals of New York, opinion by Folger, J. [14 Am. Law Reg. (N. S.) 440.] 1. In order to charge the endorser of a joint note, demand must be made on all the makers. 2. The note of partners does not come within this rule, as they are but one maker in contemplation of law, and a demand on any of them is a sufficient demand on all. 3. After a dissolution of a partnership by bankruptcy or otherwise, the powers of the several

partners to affect each other by new contracts ceases, but each retains the power to settle up the former business, and hence the dishonor of a note by either partner, is sufficient, even after dissolution, to charge an endorser. 4. The notice of dishonor to an endorser, is only required to be such as will reasonably apprise him of the particular paper on which he is to be charged. Therefore, in the absence of evidence to show that the endorser was misled, or that there was any other note to which it might apply, a notice which gave the maker's name, the date and amount of the note, the date when, the place where, and the person of whom demand was made, and the refusal to pay, was held sufficient, although it did not expressly state the time when the note came due.

ADVANCE SHEETS OF 54 NEW HAMPSHIRE REPORTS.\*

**Practice in Equity—Reformation of Lease—Construction of written contract—Words necessary to pass a Fee.**—Cole v. Lake Co. [54 N. H. 243.] Opinion by Ladd, J. 1. Where neither the rights nor liabilities of the assignor of a lease will be affected by a decree upon a bill in equity brought to reform the instrument, there is no rule of practice which imperatively requires that such assignor should be joined as plaintiff in the bill. 2. The assignment of the lease by the plaintiff after the commencement of such proceeding is not cause for dismissing the bill, the *lis pendens* being sufficient notice to the assignees so that they will be bound by the decree. 3. The court, at the law term, do not receive and consider additional evidence upon the hearing of questions reserved in equity. 4. A lease conveyed the right to draw a certain quantity of water from a canal of the lessors to the mills of the lessees, etc. It contained various covenants, and among them a stipulation by the parties that "all the covenants and agreements therein contained shall extend to and bind their legal representatives." It also contained this reservation: "Excepting and reserving to the said lessors, however, the control of the water in W. river, and in all mill-ponds, bays, lakes, and reservoirs at and above said premises, with the right of holding back and retaining and discharging the water therefrom at their pleasure, an abatement of the rent herein-after mentioned, being made in case said lessees shall be interrupted in the use of said mills thereby." Upon a consideration of the whole instrument together, it was held that the lessors could not, at their pleasure, erect a barrier to prevent the flow of water from their reservoir into the canal, and in that way terminate the lease, when such course was not necessary in their general control and management of the water. 5. The habendum was to the lessees "for and during their pleasure." *Held*, upon the whole instrument, not to create a strict tenancy at will, but a covenant for perpetual enjoyment by the lessees. 6. The lease did not contain the word "heirs," but the language used, in its common and natural sense, showed a clear and unmistakable intention to convey a perpetual right or fee. *Held*, that the court were bound to give effect to the intention and contract of the parties as thus expressed; and that there is in this state no rule of law that a fee can never pass by deed, without the word "heirs" be used.

**Partnership.**—Caldwell v. Scott. [54 N. H. 413.] 1. One partner can not employ the partnership funds or securities to the discharge of his own private debt without the consent of the other partners, either express or implied. 2. Nor does it make any difference whether such creditor knew that it was partnership property or not, that was thus applied in payment of his debt. 3. When one partner retires from the firm and releases all his interest in the assets to the other partner, who agrees to pay all the company debts, the right of priority still continues in the partnership creditors in respect to such assets.

\*Received through the courtesy of John M. Shirley, Esq., Reporter.

Notes and Queries.

RIGHT TO RECOVER PRICE OF LIQUOR SOLD BY THE DRINK.

VIRGINIA CITY, NEV., Aug. 6, 1875.

EDITOR CENTRAL LAW JOURNAL:—Under the laws of the state of Nevada, is one entitled to sue and recover in an action for liquors sold by the glass?

The first section of the compiled laws of the said state, reads as follows: "The common law of England, so far as it is not repugnant to or inconsistent with the constitution, or laws of the United States, or the laws of the territory of Nevada, shall be the rule of decision in all courts of this territory."

The Supreme Court of Nevada, in commenting upon this section of the compiled laws, in the case of *Hamilton et al. v. Keeland*, 1st Nev. 57, say: "The common law of England as adopted in this country, is usually to be taken as modified by English statutes, passed prior to the declaration of American independence."

By Statute 24th Geo. II., Chap. 4, Sec. 12, it is enacted "that no person shall be entitled to sue for, or recover any debt or demand for, or on account of any spirituous liquors, unless such debt shall have been bona fide contracted for at one time, to the amount of twenty shillings or upwards," etc.

There has been no legislation on this subject in the territory or state of Nevada.

The English statute referred to, so far from being contrary to the public policy of this country, or unsuited to the condition of our people, is unquestionably conducive to the welfare and prosperity of the community.

SUBSCRIBER.

#### MUNICIPAL CORPORATION AND TOLL BRIDGE COMPANY.

A private corporation, organized under a general law, erected a toll bridge in a street over a stream in an incorporated city, and used and controlled the same for four years without objection. The city opened and improved the street and built the approaches to the bridge, immediately after its completion. The bridge company has no rights on the premises, except such as it obtained by the foregoing facts. What are the relative rights of the city and the bridge company, with respect to the permanent use and control of the bridge?

### Legal News and Notes.

—SOUTH Carolina has one colored man, Judge Wright, upon its supreme bench, and about fifty colored men practicing at the bar throughout the state.

—THE Washington Chronicle for August 8, publishes "pen portraits" of Hon. Joseph Holt, Judge Advocate General, and Major Henry O'Connor, Solicitor of the Department of State.

—THAT enterprising daily journal, the New York Herald, which is said to be "a history of the World for one day," continues to publish abstracts of the decisions of the Supreme Court of the United States, delivered at the October Term, 1874.

—IT seem that if Senor Mariscal, the Mexican envoy, brings suit for the gold he had on deposit with Duncan, Sherman & Co., his suit will have to be brought in the Supreme Court of the United States, that court being the only one which has original jurisdiction in suits where a foreign ambassador is a party.

—AT a recent meeting of the Lancaster (Nebraska) County Bar Association it was resolved that the president and secretary be requested to extend an invitation to all bar associations and members of the bar throughout that state, to meet at the state capitol at the next session of the supreme court, for the purpose of forming a State Bar Association.

—THE New York Supreme Court denies the legality of marriage by force. It has decided this in the case of a man in Livingston county, who was forced by another to marry a girl against his will, a revolver being used to aid the coercion. The court made a decree declaring the marriage null and void, and giving both parties the privilege of again marrying.—[*The Legal Chronicle*.]

—PASSPORTS.—American travellers complain of frequent annoyance from officers of foreign governments in consequence of their not being furnished with passports. American citizens about to proceed abroad, would, therefore, do well to provide themselves with these safeguards, which if not procured at the Department of State can be obtained at any of the United States legations in foreign countries.

THE proceedings of the English Court of Probate at Westminster, were recently enlivened by the reading of the following codicil to the will of Thomas Morris Kelly:

I have neither kith nor kin,  
Bequeath all what I've named herein  
To Harriet, my dearest wife,  
To have and hold the same for life.  
While in good health, and sound of mind,  
This codicil I've undersigned.

—JUSTICE in England seems in some cases at least not a respecter of persons. Colonel Valentine Baker, of the Tenth Hussars, was recently tried before Sir William Baloli Brett of the Common Pleas, for committing a libidinous assault upon a young lady in a railway carriage. The learned judge refused him a special jury, thinking that a common jury was good enough to try the issues of fact presented. He was convicted, and sentenced to a year's imprisonment, and was subsequently dismissed the service. Colonel Baker had previously borne an honorable reputation in the army, and is, it is said, a relative of Sir Samuel Baker, the great African explorer.

—A VERY remarkable lawyer has recently died in Philadelphia. A meeting of the Philadelphia bar was held on the 7th instant, as usual in America, to convey their sympathy to the bereaved family. The deceased was Mr. Robert Bethell. He had been fifty years at the bar. During that period he "bore with patience and blamelessness the cares of life," "never lost his temper," and "died without leaving behind a single enemy." "His want of fame was owing to the gentleness of his character." The Philadelphia bar is evidently distinguished for amiability, for we are told of Judge Stroud, also recently

deceased, that "his irritability was like a summer cloud, and passed away in a moment." This learned Judge was, however, obviously not faultless, for "to the very last he criticised with vigor and ability the decisions of the higher courts,"—a piece of impertinence in a retired judge which is simply inexcusable.—[*The Law Times*.]

—SOCIAL SCIENCE CONGRESS.—The following are the legal questions selected for discussion at the meeting at Brighton:—1. Jurisprudence Department.—International Law Section.—What, if any, are the modifications required in the existing Law of Nations? And how may Municipal Law best be brought into Harmony with International Obligations? Municipal Law Section.—1. Is it desirable that a prorogation of Parliament should affect the position of bills and other matters in progress as it now does? 2. Is the codification of the law of England practicable; and, if so, in what form? 3. Is it possible, by the creation of a special tribunal or otherwise, to provide for the more satisfactory trial of claims for bodily injuries? Repression of Crime Section.—1. Has the Prevention of Crime Act of 1871, proved satisfactory in its operation? 2. What improvements are required in the present treatment of prisoners in county and borough goals?—[*The Law Journal*.]

—JOHN A. FINCH, Esq., of Indianapolis, is publishing a series of valuable and forcibly written articles on life insurance, in the Indianapolis Journal. Some idea of Mr. Finch's views may be gathered from the concluding sentences of his fourth article, which appears in that journal for August 13:

"It is needless to continue citations of cases. Enough have been given to show that there is only too much reason to believe—as so many do—that companies pay or withhold payment without regard to justice or equity—from whim, caprice, or favor. There seems to be no safety, no absolute certainty, no irrevocable insurance. It will ever be useless for companies to expect popular regard while such defences are urged. Until there is a vital, radical change in the terms of the policies, in the selection and authority of agents, and in the method of paying losses, the present burden of disrepute will rest upon the life-insurance interests. The question of the existence and value of life insurance, depends upon how this imperative change is met, either by the companies voluntarily, or after enactments of legislatures. It is a great interest, and ought to be saved from its present degradation."

—HON. JESSE O. NORTON, a prominent lawyer of Chicago, is dead. Before the war, he was on the bench in a circuit adjacent to Cook county, and filled the position with great acceptability to the people and the bar. The most memorable case, perhaps, which he ever tried, was the celebrated Burch divorce suit, wherein the then wealthiest banker of Chicago sued for divorce, charging his wife with adultery, the alleged guilty man being Hon. David Stewart, for some time a member of Congress. Mrs. Burch was very beautiful, a niece of Erastus Corning, of New York. The case was taken from Chicago to Naperville by change of venue, and tried by Judge Norton in 1860. Mr. Browning, afterwards secretary of the interior, was principal counsel for Mrs. Burch, who was successful. The trial elicited wide-spread interest at the time. Afterwards Mr. Norton was elected to Congress, but served only from March 4, 1865, to March 4, 1867. He was then appointed United States District Attorney, and filled this position with marked ability. In politics, Judge Norton was formerly a republican, but he went with Mr. Trumbull, Horace White, and the rest, in 1872, in support of Mr. Greeley. He was a man of high character and great personal popularity.

—A SOMEWHAT NOVEL MODE of settling a dispute between neighbors appears to have been adopted by Lord Coleridge at the Leeds assizes last Saturday, in case of *Hirst v. Lee*. The action, says the Times reporter, was for damages for nuisances to the premises of the plaintiff by reason of the defendant's boiling bones near to the plaintiff's premises, and throwing manure heaps against the wall of the plaintiff's house, causing the damp to come through, and building a dovecote close to the window of the house, so that the plaintiff's children were bitten by fleas from the dovecote, and large quantities of flies came into the plaintiff's house from the manure heaps, etc. The house occupied by the plaintiff belonged to his wife, who swore that the damp from the manure heaps had come through the walls of the house, that the smell from the bones was offensive, that the fleas bit the children, and that the defendant boiled tripe and trotters and brought them past the plaintiff's windows. After the examination of this witness, counsel left the matter in his lordship's hands, and his lordship holding that the circumstances detailed by the plaintiff's wife disclosed "no substantial interference with the comforts of life," directed a verdict to be entered for the defendant, each party to pay his own costs, and he further directed that the house should be conveyed by the plaintiff to the defendant at his expense. The last conveyance of the property showed that it was worth £48. The value would therefore be taken at £50, and 10 per cent. should be added as for a compulsory sale, making the price to the defendant £55.—[*The Solicitor's Journal*.]